82-1670

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHITIMACHA TRIBE OF LOUISIANA, ET AL

Petitioner

VERSUS

HARRY L. LAWS CO., INC. ET AL

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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STATEMENT OF QUESTIONS PRESENTED

I. Whether a District Court Judge should be disqualified persuant to the provisions of 28 U.S.C. §§ 144 and 455 where it is asserted that he has a financial interest in the outcome of the litigation?

II. Whether the Louisiana Indians are precluded from asserting present-day land claims by the Louisiana Land Claims Act, where there was no specific intent by Congress to extinguish Indian title?

LIST OF PARTIES

Chitimacha Tribe of Louisiana, Chitimacha Tribal Council, L. M. Burgess - Plaintiff-Appellants

E. J. Ribicheaux, Vincent J. St. Blanc, Jr., Stephanie B. Dinkins, H. H. Dinkins, Jr., Stephanie Dinkins, Gertrude O. Dinkins, Ladd O. Dinkins Atlantic richfield, Edgewater Oil, Amoco Production Company, Adeline Sugar Factory Co., Ltd., Ray A. Dupuy, Ethel Giles Chance, Beverly Marie Dupuy Comeaux, Robert F. Giles, Fabiola May Dupuy Phenis, Tenneco Oil Company, Rodney J. Banta, Elizabeth B. McGee Lemair, Michael P. Burns, Andrea R. Hertel, Texaco, Inc., Chevron Oil, Louisiana Land and Exploration, Union Oil Company of California, Eason Oil Company and Cities Service Petroleum - Defendant-Appellees

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OPINIONS BELOW

The opinion of the Court of Appeals below is reported 690 F.2d 1157 (5th Cir. 1982). The opinion of the District Court below is reported in 490 F. Supp. 164 (W.D. La. 1980).

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court below was entered on November 5, 1982. Rehearing en banc was sought and was denied on January 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Louisiana Purchase Treaty, 8 Stat. 200, Article I, Sect. 8, Article I, Sect. 10, and Article II, Sect. 2 of the United States Constitution, the Indian Nonintercourse Act, 25 U.S.C., § 177, 28 U.S.C., § 144, 28 U.S.C., § 455, Louisiana Land Claims Acts, 2 Stat. 324.

STATEMENT OF THE CASE

The plaintiff, the Chitimacha Tribe of Louisiana, is an Indian Tribe which has resided in the State of Louisiana since time immemorial.

The tribe owned and occupied portions of the present State of Louisiana as its ancient aboriginal territory.

In the year 1767, the French Crown, recognized the right of the Chitimacha Indians to the use and occupancy of their lands in which is now the present State of Louisiana.

In 1777, the Spanish Crown also recognized the right of the Chitimacha Indians to their lands.

In order to protect the Indians, both sovereigns required the express written approval of their respective Territorial Governors before any Indian lands could be alienated.

Subsequent to the recognition of the Tribe and their land by the French and Spanish Crowns, and the Louisiana Purchase by the United States, certain persons purported to cause the alienation of all of the aboriginal territory and land of the Tribe by virtue of one or more "deeds". The so-called "deeds" consisted of one to Philip Verret, two to Hyancinthe Bernard, one to Frederick Pellerin, and one to Baptiste Carmouche and Mary Joseph.

From September 10, 1794 to the early 1800's certain ands purportedly purchased by the said Philip Verret, Hyancinthe Bernard, Frederick Pellerin, and Baptiste Carmouche and Mary Joseph were conveying among themselves and were conveyed to other parties.

Acting pursuant to the purported deeds, the said Philip Verret, Hyancinthe Bernard, Frederick Pellerin, and Baptiste Carmouche and Mary Joseph undertook to convey or otherwise alienate all of the land of the Tribe to other parties.

The Tribe's present-day claim for the recovery of their lands arises under the Acts between the Chitimacha Tribe and the French and Spanish Crowns which were carried forward by the Louisiana Purchase, 8 Stat. 200, and Article I, § 8, Article I, § 10, and Article II, § 2 of the United States Constitution, and the Indian Nonintercourse Act, 25 U.S.C. § 177.

The instant case was commenced on July 15, 1977 in the United States District Court for the Western District of Louisiana.

The following chronological sequence of events will aid the Court in understanding the dilemma which plaintiff was confronted with.

On October 12, 1977, after continued historical and archaeological research, counsel for plaintiff informed Judge W. Eugene Davis that the Tribe's aboriginal claim would include an area wherein, upon information and belief, he owned immovable property. The suggestion was made that His Honor may want to consider recusal pursuant to 28 U.S.C. § 455, because of his direct interest in the subject matter of the litigation. Judge Davis adamantly refused to disqualify himself,

stating that there was "not a chance".

On July 9, 1979, after extensive discovery and more historical research, the Tribe filed a Supplemental and Amending Petition which added new defendants, broadened the claim and requested a trial by jury. Judge Davis still failed to act upon plaintiff's suggestion that he disqualify himself.

Since the District Court Judge would not disqualify himself pursuant to 28 U.S.C. § 455, it became incumbent on plaintiff to make inquiry for the possible filing of a 28 U.S.C. § 144 Disqualification Motion.

Consequently, on August 29, 1979, plaintiff formally requested a copy of Judge Davis' financial disclosure report, pursuant to Public Law No. 95-521. On September 5, 1979, plaintiff was informed by the Clerk of Court for the Western District of Louisiana, that Judge Davis would not release the requested financial disclosure report.

On October 28, 1979, plaintiff filed a Motion to Stay all further proceedings until such time as the said financial disclosure report was furnished. This motion was denied by the trial court on October 31, 1979.

On November 5, 1979, plaintiff filed a Notice of Appeal and Motion to Stay Pending Appeal. The Motion to Stay Pending Appeal was also denied by Judge Davis on November 6, 1979. An Appeal and Motion to Stay Pending Appeal was immediately lodged with the United States Court of Appeals for the Fifth Circuit under docket No. 79-3680.

On November 7, 1979, plaintiff filed a Second Supplemental and Amending Petition further defining the aboriginal land claim.

On November 12, 1979, plaintiff received notice of the Fifth Circuit's denial of the Motion to Stay Pending Appeal, for the reason that the matter was interlocutory.

On November 12, 1979, *still without benefit of Judge Davis' financial disclosure statement,* plaintiff filed a Motion for Disqualification with supporting affidavit.

It should be noted at this point that the Motion for

Disqualification was not filed until such time as plaintiff was denied protection by the Fifth Circuit.

On November 14, 1979 all motions by plaintiff and defendants' Motion for Summary Judgment were set for argument. At that time, the trial court stated, inter alia, that it would not proceed and would " . . . request my chief Judge assign this Motion for Disqualification to another Judge on this Court for hearing."

On January 10, 1980 plaintiff received the financial disclosure statement which revealed that Judge Davis did, in fact, own immovable property within the area claimed in the aboriginal territory. The disclosure statement further revealed an existing financial arrangement between the Judge and his former law firm, which has one of the defendants as a major client.

On January 14, 1980 at approximately 3:00 p.m. counsel for plaintiff were informed, *for the first time,* by telephone that Judge Nauman Scott would consider the Motion for Disqualification and that any memorandum concerning Judge Davis' financial disclosure statement should be received by the Court in Alexandria, Louisiana by January 18, 1980, less than four days hence. Counsel inquired as to how the Court would proceed, i.e., whether a hearing would be held and, if so, when. These questions were unanswered.

On January 17, 1980 counsel for plaintiff requested additional time to submit a memorandum to the Court setting forth facts revealed by the financial disclosure statement as it related to the Motion for Disqualification. Plaintiff was not afforded this opportunity and denial of the Tribe's request for additional time *was not received until January 23, 1980 upon receipt of Judge Scott's opinion and order* denying the Motion for Disqualification and coincidentally striking only that portion of plaintiff's second supplemental and amending petition which expanded the aboriginal claim to Iberia Parish where Judge Davis owned property.

Subsequent to the denial by the chief judge of the Motion for Disqualification, plaintiff discovered that Judge Scott himself held a mineral deed in the area

under litigation in St. Mary Parish. Consequently, on April 22, 1980 plaintiff filed an application seeking to have the chief judge's order denying the disqualification set aside and to have the matter re-assigned and reconsidered by a Judge with no direct interest in the outcome of the litigation. This request was also denied.

Judge Scott sent the matter back to Judge Davis who immediately set the hearing on all motions for April 25, 1980. On April 24, 1980, one day prior to the scheduled hearing date on numerous complex motions, plaintiff was informed that Judge Davis had ruled in favor of the defendants and that no hearing would be held.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Western District of Louisiana had jurisdiction over these Indian land claims under 28 U.S.C., §§ 1331, 1337, and 1362.

Reasons for Granting the Writ

It is respectfully submitted that a review on Writ of Certiorari should be granted in this matter because of the following reasons:

I. The United States Court of Appeal for the Fifth Circuit has decided a crucial question in a way which conflicts with applicable federal Court decisions and has sanctioned a departure, by the District Court, from the accepted and usual course of judicial proceedings. The question presented by petitioner was: Whether a Federal District Court Judge should be disqualified pursuant to the provisions of 28 U.S.C. §§ 144 and 455 where he has a financial interest in the outcome of the litigation? The Appellate Court ruled that such disqualification was unnecessary. This decision conflicts with the decisions of other federal courts of appeal, and more particularly *In Re Cement Antitrust Litigation*, No. 81-7465, Ct. of App., 9th Circuit (1982) and *U.S. v. Stuaiengeoellschaft Kohle, M.B.H.*, No. 79-7634, Ct. of

App., D.C. Circuit (1981).

II. The United States Court of Appeal for the Fifth Circuit held that the peitioners are precluded from asserting present day land claims by the Louisiana Land Claims Act of 1805. It is respectfully submitted that this decision is in conflict with this Court's decision in the case of *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941).

ARGUMENT

I. A FEDERAL DISTRICT COURT JUDGE SHOULD BE DISQUALIFIED PURSUANT TO THE PROVISIONS OF 28 U.S.C. §§ 144 AND 455 WHERE HE HAS A FINANCIAL INTEREST IN THE OUTCOME OF THE LITIGATION.

Title 28 U.S.C. § 144 states:

> Whether a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of the adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings...

Title 28 U.S.C. § 455 states:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the pro-

> ceeding; . . .
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceedings:
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . .
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; . . .

In the present case, after the filing of the original complaint, it became apparent that the claim would encompass vast areas of land in Louisiana. It was also apparent that since Judge Davis lived in Iberia Parish, the eventual title to his holding would be directed affected by the outcome of the proceeding.

Judge Davis was asked to consider disqualifying himself, but he refused to do so.

Attempts were then made by plaintiff to obtain Judge Davis' financial disclosure statement in order to file a Motion for Disqualification pursuant to 28 U.S.C. § 144. The plaintiff was denied access to this information.

On November 12, 1979, plaintiff filed the Motion for Disqualification after exhausting all of its available remedies. The Motion was based on information known at the time, but plaintiff still did not have access to the said financial statement. One of the grounds set forth in plaintiff's supporting affidavit was that the title to property held by the Judge in Iberia Parish would directly be affected by the outcome of the litigation.

The Court below held that the litigation would not affect Iberia Parish.

Although plaintiff did indeed file an amendment

which specifically included Iberia Parish, and other parishes, in order to more clearly specify and delineate the aboriginal territory, the Complaint, as filed on July 15, 1977, contains allegations that St. Mary Parish, Louisiana was only a *part* of the aboriginal territory located in the State of Louisiana. Only specific defendants in St. Mary Parish, Louisiana, were named, but this did not in any way limit the claimed aboriginal territory.

The Court of Appeals stated that the lower court was correct in rejecting plaintiff's amendment adding Iberia and other parishes as part of the aboriginal claim.

It should be noted, at this point, that the record indicates that Judge Davis sent only the matter of the disqualification to Judge Scott for consideration.

Judge Scott's function at that time should have been to determine only whether the allegations as set forth in the affidavit were legally sufficient to warrant disqualification. Yet Judge Scott went outside of the Motion for Disqualification and its supporting affidavit and reached into plaintiff's second Supplemental and Amending Petition and struck down *only* that portion of it which included Judge Davis' holdings in the aboriginal claim. Judge Scott then reasoned that since that portion of the claim was struck down, Judge Davis should not be disqualified.

The Court of Appeals went on further to state that " . . . the mere fact that Judge Davis owns some property within the expanse of the Chitimachas' former dominion does not justify his disqualification." (Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Opinion, at page 528.)

We submit that this is precisely the circumstance requiring disqualification pursuant to 28 U.S.C. §§ 144 and 455.

The Fifth Circuit went on to state at page 528 of its Opinion that "The disposition of the Chitimachas' claim or title to land located entirely within St. Mary Parish would not affect Judge Davis' title in any way."

We further submit that this conclusion is erroneous.

The entire claim of the Chitimacha Tribe to its lands is based on the claim which the Tribe has to the lands within its aboriginal territory. As a result, all land located within this territory will be directly affected by the outcome of this lawsuit. While only defendants in St. Mary Parish were named in this action, the potential defendants are quite numerous and involve defendants in every area of the aboriginal territory of the Chitimacha Tribe. Consequently, any person residing or owning property in the aboriginal territory would directly be affected by this lawsuit.

It is established law that an aboriginal land claim to only a small portion of the total aboriginal land of an Indian tribe will cause a cloud to the entire title of the land. See the case of *Oneida Indian Nation v. County of Oneida,* 434 F. Supp. 527 (N.D.N.Y. 1977) where the Court held:

> [T]he impact of the Onedias' claim will reach far beyond the boundaries of the present suit. In my initial decision dismissing the claim for lack of jurisdiction, I pointed out that, 'it is obvious that there are, of necessity, numerous other parties occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom . . . claims could be made'. [Citations omitted]

The Appellate Court analogized this case to one cow, out of a herd of cattle, where title to only that one cow was questioned.

We respectfully submit that this comparison was inappropriate, and that a better analogy would be where title to one lot in a subdivision was questioned where all of the said lots were derived from the same parcel. The clearing of title to one lot would clear title to all of the lots in the subdivision, even though the other lots were not specifically questioned.

In the case at bar, Judge Davis should have been

disqualified because of the effect that his decision had on his holdings within the aboriginal territory.

By ruling against the Chitimachas, Judge Davis did, in fact, cure and clear all Indian title problems to his property in Iberia Parish. His decision and the Panel's affirmation were contrary to 28 U.S.C. §§ 144 and 455 and the jurisprudence which has held that a judge should be disqualified where he has any financial interest, however small, in the outcome of the litigation. (See *U.S. v. Studiengesellschaft Kohle, M.B.H.*, No. 79-1634, U.S. Court of Appeals, D.C. Circuit, (1981) and *In re Cement Antitrust Litigation*, No. 81-7465, U.S. Court of Appeals, 9th Circuit, (1982).

II. THE INDIANS OF LOUISIANA ARE NOT PRECLUDED FROM ASSERTING THEIR PRESENT-DAY LAND CLAIMS BY THE LOUISIANA LAND CLAIM ACT, WHERE THERE WAS NO SPECIFIC INTENT BY CONGRESS TO EXTINGUISH INDIAN TITLE.

The Court below held that the Chitimachas were precluded from asserting their present-day land claim because they did not originally present their claim to the Louisiana Land Commission in 1805.

The Court of Appeals relied on the cases of *Barker v. Harvey*, 181 U.S. 481 and *U.S. v. Title Insurance & Trust Co.*, 265 U.S. 472 in holding that the Chitimacha Indians should have submitted their claim to the Land Commission.

The *Barker* and *Title Insurance* cases interpreted the provisions of the California Land Claims Act of 1851, which did, in fact extinguish Indian title in California.

It is respectfully submitted that the Court of Appeals should have relied on the cases of *Fremont v. United States*, 48 U.S. (17 How.) 542 and *Santa Fe Pac. R.R. Co.*, 314 U.S. 339.

The *Santa Fe* case held that the Act of July 22, 1854, 10 Stat. 308 involving New Mexico, and the Act of

July 15, 1870, 16 Stat. 291 involving Arizona, did not extinguish Indian title and distinguished these acts from the California Act. Before the United States Supreme Court, at the time of the decision of the *Santa Fe* case, was the argument of the United States Government that the New Mexico and Arizona Acts could be distinguished from the California Act and the holdings of *Baker* and *Title,* because the New Mexico Act and the Arizona Act were similar to the Louisiana Land Claims Act. The United States Government argued to the United States Supreme Court that it was clear that the Louisiana Land Claims Act did not extinguish Indian titles in the Louisiana Territory, *See,* United States Brief in *Santa Fe* at 82-84 (Appendix A); United States Brief in *Santa Fe* at 59-60 (Appendix B).

After the Louisiana Purchase of April 30, 1803, 8 Stat. 200, The United States embarked upon the task of attempting to determine the exact extent of the public domain lands. The United States Congress and the officials of the General Land Office realized that it would be necessary to attempt to determine the amount of land that private persons had acquired from prior predecessor sovereigns by land grants.

Congress adopted the Act of March 2, 1805, and its subsequent progeny, 2 Stat. 324.

At the time the Louisiana Land Claims Acts were passed, the Indian Nonintercourse Act, 25 U.S.C. § 177, established a fiduciary relationship between the United States and the Nation's Indian tribes under which the United States assumed the obligation to protect Indian property rights. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F. 2d 370, 379 (1st Cir. 1975), *affirming, Joint Tribal Council of the Passmoquoddy Tribe v. Morton,* 388 F. Supp 649 (D.Me 1975).

Section 1 of the Act of 1805 applied to any person who was residing in the Louisiana Territory on October 1, 1800, and who had obtained from either the French or Spanish authorities any duly registered warrant, or order of survey for lands lying within the said terri-

tories *to which Indian title had been extinguished,* and which were on that day actually inhabited and cultivated by such person or persons, or for his or her use.

The plaintiff Chitimacha Tribe asserts that the Louisiana Land Claims acts could not have extinguished any Indian title in the State of Louisiana. If by these acts Congress had intended to so extinguish Indian title, then there would have existed no aboriginal land claims in the Louisiana Territory. It is obvious that Congress had no such intention at all, since Congress entered into two Treaties with Indian Tribes for aboriginal land claims in the present State of Louisiana subsequent to the enactment of the Louisiana Land Claims Acts. Treaty of Quapaw of August 24, 1818, 7 Stat. 176; Treaty of Caddo of July 1, 1835, 7 Stat. 470.

In Louisiana, Congress did not intend to extinguish Indian title, or require Indians to submit their claims to the Louisiana Land Commission.

If Congress had so intended, such legislation would have had to be express. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974); *United States v. Santa Fe Pac. R.R. Co.,* 314 U.S. 339 (1941). Furthermore, recognized title claims of any person definitely did not have to be presented pursuant to the Louisiana Land Claims Acts. The Petitioner Chitimacha Tribe had both aboriginal title and recognized title to its lands, by Acts of the French and Spanish Sovereigns, and by the Spanish law of just prescription. consequently, they were not required to present their claims to the Land Commissioners.

CONCLUSION

It is respectfully submitted that the lower court judge should have been disqualified because by ruling against the Chitimachas and in favor of the defendants, he gained a financial interest by eliminating any aboriginal claims against his land holdings.

It is further respectfully submitted that the Chitimacha Indians were not required to present their

claims before the Louisiana Land Claim Commission, and that Congress did not specifically intend to extinguish Indian title in Louisiana.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

Guy J. D'Antonio

Guy J. D'Antonio

Harry Case Stansbury

Harry Case Stansbury

CERTIFICATE

I hereby certify that the required copies of this Petition for Certiorari have been deposited in the United States Mail, postage pre-paid, addressed to the following:

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APPENDICES

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APPENDIX "A"

(pp. 82-85 of United States Brief)

The 1870 act appointing a Surveyor General for Arizona did not extinguish the occupancy rights here asserted.

In the first place, an attempt has been made to read the language of extinguishment or forfeiture into a provision in the appropriation act of July 15, 1870 (16 Stat. 291, 304) (Appendix I, II), providing for the appointment a Surveyor General for Arizona charged with the investigation of Spanish and Mexican land titles. It is no doubt true that the Surveyor General did not consider claims based upon Indian rights of occupancy that antedated Mexican or Spanish sovereignty. This proves nothing at all. The surveyor General was not directed to define the boundaries of Indian country. Rather, he undertook the narrower task of verifying titles originating under Spanish or Mexican grants, and his conclusions are therefore irrelevant to a question of Indian occupancy not based upon such a grant. See *Cramer v. United States*, 261 U.S. 219, 231 (1923). But even if he had tried to examine into the scope and extent of Indian occupancy rights, the fact that he never made a report on the Walapai would not show that the Walapai had no such rights. The Surveyor General of New Mexico under similar legislation reported on various Pueblo claims under alleged Spanish grants. He did not include in his list the claims of the Pueblos of Santa Anna and Zuni, but this did not prevent Congress in 1869 from recognizing the validity of the title claimed by the former pueblo[1] or, in 1931, that of the latter.[2] Nor did these amissions by the Surveyor General prevent administrative recognition and protection of the lands of these two pueblos prior to such congressional confirmation.

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[1] Act of February 9, 1869 (15 Stat. 438).

[2] Act of March 3, 1931 (40 Stat. 1509).

The legislation setting up the offices of Surveyor General for Arizona and New Mexico did not in terms cut off any Indian occupancy rights an was not intended to do so. In this, the legislation must be distinguished from the act setting up a court of private land claims for California (act of March 3, 1851, 9 Stat. 631), which specifically referred to Indian claims (sec. 16) and declared invalid all claims derived from the Spanish or Mexican Government not presented within two years and all claims not confirmed by that court (sec. 13). *Barker v. Harvey,* 181 U.S. 481 (1901). The legislation designed to scrutinize land claims in Arizona and New Mexico was similar to that which covered land claims in Louisiana Territory. Section 2 of act of March 2, 1805 (2 Stat. 324, 325). The decisions of this Court in *Choteau v. Molony,* 16 How. 203 (1853); *Buttz v. Northern Pacific Railroad,* 119 U.S. 55 (1886); and *United States v. Shoshone Tribe,* 304 U.S. 111 (1938), make it clear that the act of 1805 did not destroy all Indian titles in the Louisiana Territory. No more did the 1870 act destroy all Indian titles in Arizona.

It is clear that the 1870 act appointing a Surveyor General for Arizona, and the action taken thereunder, did not amount to an extinguishment of land title with Indian consent in the manner prescribed by the act of July 27, 1866. It is equally clear that it did not amount to an amendment or repeal by implication of the 1866 act. It follows, therefore, that the 1870 legislation left intact whatever rights of possession existed in the Walapai Tribe on July 27, 1866.

APPENDIX "B"

(pp. 58-61 of United States Reply Brief)

few years, has sought to upset an occupancy that has continued undisturbed for many centuries before and for many decades after the alleged claim of the railroad to possession of these lands first arose. Possibly some small share of blame may be ascribed to the government for failing, years ago, to foresee that the respondent would claim not only title to the reservation lands but the right to eject the Indians therefrom. Possibly, too, some slight share of responsibility for delay in the presentation of these issues may be ascribed to the unfortunate decision of this Court in *United States v. Joseph,* 94 U.S. 614 (1876), which, until overruled implicitly in *United States v. Sandoval,* 231 U.S. 28 (1913), and explicitly in *United States v. Chavez,* 290 U.S. 357 (1933) (see Petitioner's main brief, pp. 31-32), gave support to a belief widely current in the Mexican Cession area that the United States had a lesser degree of responsibility for the protection of nontreaty Indians in that area who had enjoyed civil rights under the Mexican government than it had to Indians in other parts of the country and that this lesser responsibility did not include the protection of land claims. However this may be, respondent cannot escape primary responsibility for fixing the date of this litigation by refraining, until very recently, from committing the acts of trespass which are the gravamen of the present complaint (R. 8 19).

B. *None of the material upon which respondent relies indicates an extinguishment of Walapai occupancy rights prior to 1866.*

The railroad contends that legislation and administrative conduct prior to the granting act of July 27, 1866, extinguished Walapai rights or failed to recognize them so that the lands were free from Walapai claims when the granting act was passed and therefore the railroad's title was free from Indian occupancy

rights when the granting act was passed. That there is no need for affirmative recognition of occupancy rights has been elsewhere argued by the Government (Petitioner's brief, pp 27-29; Reply Brief, pp-21-41).

Despite the charge of the railroad that the government has ignored pertinent legislation and administration prior to 1866, the Government has already discussed all of these matters.[3]

The respondent claims that the act of March 3, 1851 (9 Stat. 631), and the failure to ratify negotiations with California Indians for treaties, establish that all rights in the entire Mexican Cession were abolished and that the same land policy which was adopted for California was effective in Arizona (Respondent's brief, pt. 1, pp. 40-42). Arguments from the California situation are of little value because the law governing the protection of Indian rights was peculiar to that State. *Barker v. Harvey,* 181 U.S. 481 (1901); Goodrich, The Legal Status of the California Indians (1926), 14 Calif. L. Rev. 83, 157, and Petitioner's brief, p. 84. The act of March 3, 1851 (9 Stat. 631), relating to California specifically directed the Commissioner to report on Indian land claims (sec. 16) and provided that all claims not filed within the period specified in the act were abandoned. But the act of March 3,1891 (26 Stat. 854), to establish a court of private land claims for Arizona specifically prohibited that court from interfering with Indian claims.

All that the respondent shows, in its discussion of the unratified California treaties, is that in California the President and the Senate, whose joint action might have formulated a national policy, were unable to agree on any policy at all (Respondent's brief, pt. 1, p. 41). Respondent's argument on Indian treaties in the Mexi-

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[3] The preemption act of September 4, 1841 (5 Stat. 453), Petitioner's main brief, pages 40-42; the Treaty of Guadalupe Hidalgo (9 Stat. 922), *ibid.*, pages 48, 60; the act of September 9, 1850 (9 Stat. 446, 452), organizing New Mexico Territory and extending the trade and intercourse acts to that Territory, pages 38-40; the act of March 3, 1851 (9 Stat. 631), to ascertain and settle private land laims in California, *ibid.*, page 84; and the act of July 22, 1854 (10 Stat. 308), establishing the office of surveyor general in New Mexico, Kansas, and Nebraska, *ibid.*, pages 40, 41, and 46.

can Cession area shows only tha tout of a long series of Indian treaties by which the United States secured the exinguishment of aboriginal accupancy rights in a large part of the Mexican Cession area, one treaty, with the Taberguache Band of Utes, provided that the Band would retain only those rights (presumably rights of occupancy but not of alienation) enjoyed under Mexican law (and not, as Respondent's brief erroneously states at page 44, that the Government would not "recognize any rights in the Indians").

It is next said by the railroad (Respondent's brief, pt. 1, p. 40) that the act of September 9, 1850 (9 Stat. 446), creating a Territorial government for New Mexico (Arizona), and granting to that Territory two sections in each township for school purposes, extinguished Walapai rights. That such a grant of school lands does not extinguish Indian rights has been held by this Court in two cases. *Beecher v. Wetherby,* 95 U.S. 517 (1877), *Wisconsin v. Hitchcock,* 201 U.S. 202 (1906). The assertion in Respondent's brief, pages 61 and 63, that the act of March 3, 1853 (10 Stat. 244), expressly declared that the even-numbered sections in Arizona were public lands is misleading because the Indian Intercourse Act of June 30, 1834 (4 Stat. 729), and the preemption act of September 4, 1841 (5 Stat. 453), and the instructions of the General Land Office (Reply Brief, pp. 48-49), all prohibited settlement upon or the preemption of lands occupied by Indians. See *Buttz v. Northern Pacific Railroad,* 119 U.S. 55, 70 (1886).

The argument(Respondent's brief, pt. 1, pp. 49-53) that the provision in the appropriation act

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

THE CHITIMACHA TRIBE OF LOUISIANA ET AL

VS.

HARRY L. LAWS COMPANY, INC. ET AL

CIVIL ACTION NO. 770772

JUDGMENT

For reasons assigned this date,

IT IS ORDERED, ADJUDGED AND DECREED that defendants' motions for summary judgment be and they are granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be and it is dismissed with prejudice.

Lafayette, Louisiana, this 24th day of April, 1980.

W. Eugene Davis
Judge, United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

THE CHITIMACHA TRIBE OF LOUISIANA ET AL

VS.

HARRY L. LAWS COMPANY, INC. ET AL

CIVIL ACTION NO. 770772

RULING ON MOTION

Plaintiff, the Chitimacha Tribe of Louisiana, (Chitimacha Tribe) claims ownership of a large tract of land in St. Mary Parish, Louisiana. Plaintiffs allege that the lands they claim were part of the Indian Tribe's aboriginal territory and that the deeds by which the tribe sold the lands to defendants' ancestors in title were nullities.

UNCONTESTED FACTS

No material issue of fact is raised as to the following:

1) The Chitimacha Tribe purported to transfer to defendants' ancestors in title the land involved in this litigation as follows:

a) To Phillip Verret by deed dated September 10, 1794.

b) To Frederick Pellerin by deed dated October 2, 1794.

c) To Marie Joseph by deed dated June 22, 1799.

(Defendants' three ancestors in title may sometimes be referred to as "Verret et al".)

2) Following the Louisiana purchase in 1803, Verret et al sought United States recognition of their title by making claim to the land according to proce-

dures set forth in acts of congress (Louisiana Land Claims Acts). Favorable reports were made on these claims by the commission authorized by Congress to adjudicate the claims, and the claims of Verret et al were confirmed by the Congress in 1816.

ISSUE PRESENTED

Plaintiffs contend, for various reasons, that the transfers executed by the tribe in favor of Verret et al were a nullity. Plaintiffs' primary claim is that the transfers violated the terms of the Indian Nonintercourse Act which provided:

> That no sale of land made by any Indian or any nation or tribe of Indians within the United States shall be valid to any person or persons, or to any state, whether having the right of peremption to such lands or not, unless the same shall be made and duly executed at some public treaty held under the authority of the United States.

Act of July 22, 1790, 1 Stat. 317.

Among the defenses raised by the motions for summary judgment are: 1) Prior to the United States' sovereignty over Louisiana, all of the lands involved in this suit were validly transferred pursuant to Spanish law to Verret et al, and consequently the Indian Nonintercourse Act, a statute of the United States, has no application to those transfers; 2) after its acquisition of Louisiana, the United States approved and confirmed each of the titles acquired by Verret et al and even if the Indian Nonintercourse Act is deemed applicable, it cannot have the effect of invalidating defendants' title. More particularly, defendants urge that under the Louisiana Land Claims Acts the Congress established the exclusive procedure for claiming title to land within the Louisiana purchase and precluded all other claims, including plaintiffs' claims asserted in this action.

DISCUSSION

I conclude that plaintiffs' title to the land claimed in this suit has been extinguished and plaintiffs are barred from asserting these claims under the preclusive provisions of the Louisiana Land Claims Acts. On this basis alone, the defendants' motions for summary judgment are granted, making it unnecessary to consider any other basis for the motions urged on us by defendants.

Because of the changes of sovereignty between France and Spain prior to 1803, the different land acquisition policies of those two nations and the incomplete state of the French and Spanish land records, considerable confusion reigned with respect to land ownership at the inception of United States sovereignty over this territory. *See* Coles, *The Confirmation of Foreign Land Titles in Louisiana,* 38 La. Historical Quarterly 1 (1955). As a consequence, the Congress enacted the Louisiana Land Claims Acts.[1]

These acts generally required all private claimants to register a notice of their claim with the Register of the Land Office and provided for a board of land commissioners to review, analyze and report upon the claims filed. The 1807 act (which amended and supplemented the 1805 and 1806 acts) expanded the functions and powers of the land commissioners by providing "that the commissioners . . . shall have full powers to decide according to the laws and established usages and customs of the French and Spanish Governments upon all claims to lands within their respective districts, . . . which decision of the commissioners, when in favour of the claimant, shall be final against the United States, any act of Congress to the contrary notwithstanding."

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[1]Act of March 2, 1805, 2 Stat. 324; Act of March 21, 1806, 2 Stat. 391; Act of March 3, 1807, 2 Stat. 440; Act of March 10, 1812, 2 Stat. 692; Act of April 14, 1812, 2 Stat. 709, Act of February 27, 1813, 2 Stat. 807; Act of April 18, 1814, 3 Stat. 139; Act of April 29, 1816, 3 Stat. 328; Act of May 11, 1820, 3 Stat. 573; Act of May 16, 1826, 4 Stat. 168; Act of May 26, 1824, 4 Stat. 52 (extended to Louisiana by Act of June 17, 1844, 5 Stat. 676). Hereinafter these enactments will be referred to individually by the year of their passage and collectively as the Louisiana Land Claims Acts or Louisiana Acts.

Beginning with the 1805 Act, Congress also established time limitation for filing notice of claims:

> And if such person shall neglect to deliver such notice in writing of his claim, together with a plat as aforesaid, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and forever thereafter be barred; . . . .

The 1807 Act extended the time for filing notice of claims, but also contained peremptive language:

> [B]ut the rights of such persons as shall neglect so doing [filing notice of claim] within the time limited by this act, shall, so far as they are derived from or founded on any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law or equity whatever.

Subsequent enactments extended the time for filing tices, but in each instance Congress provided (often in identical terms) that untimely claims would be void and any evidence of them deemed inadmissable in courts of the United States.[2]

In *Barker v. Harvey,* 181 U.S. 481, 21 S. Ct. 690, 45 L. Ed. 963 (1901), the Supreme Court was called on to interpret a similar provision of the California Private

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[2]See Act of March 10, 1812, 2 Stat. 692 § 1; Act of April 14, 1812, 2 Stat. 709, § 1; Act of February 27, 1813, 2 Stat. 807, § 1; Act of May 11, 1820, 3 Stat. 573, §§ 2, 4; Act of May 26, 1824, 4 Stat. 52 §§ 5, 7 (extended to Louisiana by Act of June 17, 1844, 5 Stat. 676).

Land Claims Act.[3] Plaintiffs sued to quiet title to land held under a patent confirming grants made by the Mexican government to the plaintiffs' ancestor in title. The defendants, Mission Indians, contended that plaintiffs' title was subject to their right of permanent occupancy which they claimed had been recognized by the government of Mexico long before the existence of the grants relied on by the plaintiffs. The Court had no difficulty in concluding that the Indian claims were abandoned when they were not presented to the commission for consideration within the time allowed by the act.

A similar result was reached in *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 44 S. Ct. 621, 68 L.Ed. 1110 (1924). In that case, the United States brought suit on behalf of the Mission Indians to confirm in them a perpetual right of occupancy, use and enjoyment in certain property held by the defendants under a government patent which confirmed a Mexican land grant. The Court followed *Barker's* interpretation of the California Act and held that the Indians' claim was barred because it had not been presented to the commission and that full title, unencumbered by any rights of the Indians, had passed to the defendants.

The plaintiffs seek to distinguish these decisions on two grounds. First, they contend that the statutes in question bear more similarity to those interpreted in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L.Ed. 260 (1941) than to the California Act. Their second argument is that the absence of a specific provision extinguishing Indian claims in the acts covering Louisiana prevents the loss of their rights by peremption.

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[3] Act of March 3, 1851, 9 Statutes at L. 631, Chap. 41, § 13 provides:

That all lands, the claims to which have finally been rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all lands the claims to which shall not have been presented to the same commissioners within two years after the date of this act, shal be deemed, held and considered as part of the public domain of the United States . . . .

In *Santa Fe,* suit was brought by the United States on behalf of the Walapai tribe to enjoin the defendant railroad from interfering with the tribe's possession and enjoyment of property in Northwest Arizona. The government contended that its grant of the property to the railroad was subject to the Indians' right of occupancy. The railroad argued that all Indian rights had been extinguished by the operation of certain enactments[4] which authorized the Surveyors General of the New Mexico Territory and the Arizona Territory to ascertain the origin, nature, extent, an character of land claims under Spanish or Mexican authority. In holding that these statutes did not extinguish the Indian claims, the Court contrasted the statutes under review with the California Private Land Claims Act.

> The acts of 1854 and 1870, unlike the Act of 1851, merely call for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the Surveyor General but form action of Congress based on his reports.

314 U.S. 339, 351, 62 S. Ct. 248, 253, 86 L. Ed. 260 272.

It is clear from a reading of the statutes and the decisions interpreting them that the Louisiana Land Claims Acts bear more similarity to the California Private Land Claims Act than to the acts reviewed in *Santa Fe.* The Louisiana and California Acts establish systems for filing, deciding and confirming land claims; both acts require claims to be asserted within a designated period or be forever barred. In contrast, the New Mexico and Arizona Acts merely require a report to Congress on the status of land claims in the territories.

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[4]Act of July 22, 1954, 10 Stat. at L. 308, Chap. 103, § 8; Act of July 15, 1870, 16 Stat. at L. 291, 304, Chap. 292. A third statute, Act of March 3, 1865, 13 Stat. at L. 541, 559, Chap. 127, proposed to create a reservation for the Walapai tribe; it is clearly inapplicable to the instant case.

The plaintiffs also contend that Indian claims cannot be extinguished in the absence of a specific, express reference to such claims and that the Louisiana Land Claims Acts were not intended to affect Indian land. In support of this position, the plaintiffs interpret the decision in *Barker* to be predicated on a reference to Indian claims in § 16 of the California Act.[5]

Plaintiffs' interpretation of *Barker* is specious. Although Court mentioned § 16 in passing, the decision is based entirely on the provision requiring timely filing of claim notices.

The Court, in *Santa Fe,* distinguished *Barker* solely on the basis of the extinguishment of claims provision in the California Act. No reference was made up § 16 of the California Act. For these reasons, it seems clear that the Court's decision in *Barker* is not predicated on the specific reference to Indian claims found in § 16 of the California Private Land Claims Act.

Moreover, scrutiny of the statutory language reveals congressional intent for the Louisiana Land Claims Acts to extend to Indian claims. Under § 4 of the Act of March 2, 1805, the seminal enactment, "every person claiming land in the above-mentioned territories" was required to file a notice of any claim he wished to assert; no exception was made for any group of landholders. In addition, Section 1 of the same act provides for confirmation of certain claims "for lands lying within the said territories to which the Indian title had been extinguished", and indication that the commissioners were authorized to determine questions concerning the validity of Indian claims. The Opelousas

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[5]Section 16 of the California Act provides:

> That it shall be the duty of the commissioners herein provided for to ascertain and report to th Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos and Rancheros Indians.

Claims Reports clearly reflect this general practice by the Louisiana Commissioners.[6]

The investigation of claims for lands purchased from Indians seems to have brought into view four distinct classes. First. Claims for lands purchased from Indians denominated Christians, whose sales are generally for small tracts of such extent as an Indian and his family might be supposed capable of cultivating: passed before the proper Spanish officer, and duly filed of record. These sales are believed to have been valid by the usages of the Spanish Government without ratification being necessary. Secondly. Claims for lands purchased from some tribe, or chief of some tribe of Indians, the sales of which may have been ratified by the Governor of the province. These are also considered as valid; the Indian sale transferring their right; the ratification of the Governor being regarded as a relinquishment in favor of the purchaser of the right of the crown. Thirdly. Claims for land purchased from Indians of the description last mentioned, who, from the evidence adduced before the Board, shall appear to have been in the actual occupancy of the land at the date of their sales, but whose deeds of sale may not have been presented for the ratification of the governor. In this case, the Indians are considered as having transferred only the right of occupancy which they held at the will of the Government. The title is incomplete, but the purchaser supposed to have an equitable claim for the confirmation of his title to so much of the land claimed, as would be a

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[6]In the conclusion to their report of April 6, 1815, the commissioners summarized the principles applied in evaluating claims based on purchases from Indians:

> The undersigned commissioners are of opinion that there is a wide difference between the titles of such persons as have purchased lands from Indians, which such Indians were actually occupying at the date of their sales, and the titles and claims of persons who purchased from Indians not in the actual occupancy of the land at the date of their sales. Purchasers of the first description, although the deeds of transfer may not have been presented, and of course could not have received the governmental sanction, may be considered as having extinguished the kind of title which the Indians enjoy, and are, therefore, in the opinion of the commissioners, equitably entitled to so much at least of the land claimed as would be a full indemnity for the consideration they may have paid for it. Purchasers of the second description would not, in the opinion of the Board, be entitled to any remuneration, because it is conceived the Indians, in such cases, were selling a thing to which they had no kind of title.

full indeminity for the consideration he may have paid. fourth, and lastly. Claims for lands sold by Indians of the last description, who did not occupy them at the date of their sales, and whose sales have not been ratified by any Governor of Louisiana. Such sales are considered as vesting no title in the purchasers; and the claims such (unless accompanied by some equitable circumstance in their favor) as, in the opinion of the Board of Commissioners, ought not to be confirmed.

Congress' express approval and adoption of the Opelousas Claims Reports by the Act of April 29, 1816, 3 Stat. 328, belies the plaintiff's contention that the title confirmation acts were not intended to apply to Indian lands.

further support for the position that the acts applied to Indian lands is found in *United States v. Arredondo,* 6 Peters 691, 8 L.Ed 547 (1832). In that case, the plaintiff brought suit to confirm his claim to Florida property held under a spanish grant. The United States took the position that the land involved was in Indian territory and therefore not subject to the grant. The Court noted that Spanish autorities in Florida had conducted a sort of inquest and had determined that the Indians had abandoned the lands in question. In discussing its reasons for giving *res judicata* effect to this decision, the Court noted the similarity of the Spanish proceeding to those established in various title confirmation acts. In passing, the Court seemed to indicate that Indian claims were embraced by the Act of May 11, 1820, a title confirmation statute applicable in both Florida and Louisiana which made no specific reference to Indian claims:

> Similar proceedings are directed by the various acts of Congress; the land-commissioners, or officers of the land offices, as the case may be, confirm or reject claims, and the land embraced in the rejected claims reverts to the public fund. So it is provided by the seventh section of the Act of 1824,

> as to claims barred by not being duly presented or prosecuted, or which shall be decreed against finally by this court. There is another answer to this objection, which deserves notice: grants of land within the Indian boundary are not excepted in the laws referring them to judicial decision; congress made what exceptions they thought proper; as the law has not done it, we do not feel authorized to make and exception of this.[7]

6 Peters 691, 748, 8 L. Ed. 547, 568.

The plaintiffs' argument for the inapplicability of the Louisiana Land Claims Acts to Indian land is therefore unpersuasive. In *Barker v. Harvey,* the Supreme Court interpreted less forceful language to effect an extinguishment of Indian claims which were not presented to the claim commissioners. the plaintiffs' position that the statutes construed in *Santa Fe* provide a better guide than the California Act is unsupportable — the similarities of the Louisiana and California Acts are unmistakable, their differences with the Arizona and New Mexico Acts palpable.

The plaintiffs' corollary position, that Congressional intent to extinguish Indian title must be express and that the Louisiana Acts lack a specific reference to Indian claims, is equally untenable. As noted above, the statutory language and local practice, which was later approved by Congress, both indicate that congress intended to vest the commissioners with authority under the Louisiana Land Claims Acts to decide questions concerning Indian titles.

The defendants' motions for summary judgment are granted.

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[7] *See also Plamondon ex rel Cowlitz Tribe v. United States,* 467 F.2d 935 (Ct. Cl. 1972).

This disposition of the case makes it unnecessary to consider the additional issues presented by the motions of plaintiffs and defendants.

Lafayette, Louisiana, this 24th day of April, 1980.

W. Eugene Davis
Judge, United States District Court

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE DIVISION

THE CHITIMACHA TRIBE OF LOUISIANA ET AL

VS.

HARRY L. LAWS COMPANY, INC. ET AL

CIVIL ACTION NO. 770772

ORDER

For reasons set out in our written opinion of this date;

LET plaintiffs' motion to file a second supplemental amending complaint be and it is hereby DENIED insofar as that motion applies to Paragraph IV amending Paragraph 8 of the original complaint, reserving to plaintiffs any and all rights under its motion as it applies to Paragraphs I, II, III, and V.

LET plaintiffs' motion for disqualif cation of judge be and it is hereby DENIED.

Alexandria, Louisiana, this the 22nd day of January, 1980.

Nauman S. Scott
United States District Judge

OPINION

Plaintiffs filed this proceeding on July 15, 1977 claiming title to property in St. Mary Parish, Louisiana. The litigation is most complex and the record is

contained presently in ten volumes. Defendants' motions for summary judgment and plaintiffs' motion to strike, previously set for hearing on November 8, 1979, were reset for hearing on November 14, 1979. On November 13, 1979, almost two and a half years after the filing of their complaint and one day previous to the hearing of the motions above, plaintiffs filed a "Motion for Disqualification of Judge" under the provisions of 28 U.S.C. § 144 and 28 U.S.C. § 455

> "because the following facts appear which will impair his Honor's impartiality, and show bias in favor of certain defendants and further which show a financial interest in the outcome of the litigation:
>
> I.
>
> "That, upon information and belief, the Honorable W. Eugene Davis resides and owns immovable property within the litigation area.
>
> II.
>
> "That, upon information and belief, one of his Honor's former clients is Texaco, Inc., which is a named defendant herein.
>
> III.
>
> "That, Lawrence Simon, Jr., James L. Helm, Jr., John Henry Helm, Sarah Hastremski Helm, Sarah Frances Helm Evans, Adele S. Forest, Mildred M. Swatloski, and Mildred S. Linn, all named defendants, are the children and /or widows of members of his Honor's former law firm, namely Lawrence Simon, Sr. and James L. Helm, Sr. and further, property belonging to members of his Honor's former associates is claimed as aboriginal territory.

IV.

"That, upon information and belief, his honor has rendered title opinions and passed acts of sale as an attorney and Notary Public for various parcels of property in the area claimed by the Chitimacha Tribe of Louisiana as aboriginal territory and may bear professional liability as a consequence thereof and would, therefore, have a direct interest in the outcome of the present litigation."

At the November 14, 1979 hearing on the motions for summary judgment and motions to strike the judge stated:

"THE COURT: All right, gentlemen, in Civil Action Number 77-0772, Chitimacha Tribe of Louisiana versus Harry L. Laws Company, et al, we have numerous motions fixed for trial today.

"The defendants filed motions for summary judgment approximately nine (9) months ago. The plaintiffs filed motions to strike certain of the defenses over a year ago. These motions which are complex, potentially dispositive motions, we fixed for hearing on November 8th of this year and notice of that fixing went out in July of this year. Because of a trial which ran over last week, I continued those motions from November 8 until today.

"At 3:00 P.M. yesterday, I received notice that the plaintiffs had just filed a motion to disqualify me as the presiding Judge in the case. This motion was not timely filed as required by 28 U.S. Code Section 144. It's absolutely inexcusable for plaintiff's counsel to have delayed filing the motion to disqualify until the day before this hearing was scheduled. This delay has caused the Court and other counsel to waste substantial time in the preparation for the hearing on these complex motions.

"I would be justified in denying the motion for disqualification simply on the basis that the motion was not timely filed. However, nothing is more important to our system of justice than to have impartial judges presiding over trials. I can state for the record that I have no bias in this case or prejudice in this case, I know of no interest I have in the outcome of this litigation. Out of an abundance of precaution I am going to request that my Chief Judge, Nauman Scott, assign this motion for disqualification to another Judge on this court for hearing. Certainly if one of my brother Judges concludes that there's any impropriety or even any appearance of impropriety in my presiding over this case, then the case obviously should be and will be reassigned.

"Gentlemen, no further action can be taken in this case until the motion for disqualification is decided. I'll direct that the Court Reporter transcribe the remarks and forward them to Judge Scott along with the motion for disqualification and the affidavit filed in support thereof.

"We will be in recess."

SECOND SUPPLEMENTAL AND AMENDING COMPLAINT

As part of the background for consideration of the motion before us we must consider plaintiffs' motion to file their "second supplemental and amending complaint" filed November 7, 1979, one day prior to the date on which the motions for summary judgment and to strike were originally set for hearing (November 8, 1979).

Paragraph IV seeks to amend Paragraph 8 of the original complaint which reads as follows:

"8. Since time immemorial, the plaintiff Tribe

> has exclusively owned, used and occupied portions of the present parish of St. Mary, Louisiana, as part of its aboriginal territory."

to read and be substituted by the following:

> "8. Since time immemorial, the plaintiff Tribe has exclusively owned, used and occupied Iberia Parish, St. Mary Parish, St. Martin Parish, Iberville Parish west of the Mississippi River, Assumption Parish, and Ascension Parish west of the Mississippi River as their aboriginal territory."

It is quite obvious that plaintiffs are claiming title to all or part of nine sections in the Charenton Field in St. Mary Parish, Louisiana. The titles to no other lands are in jeopardy, not even other lands in the same township or adjacent lands in the same Charenton Field.

The allegation of Paragraph 8 in the original complaint that these nine sections are part of aboriginal territory of the Chitimacha Tribe of Louisiana is appropriate and relevant to the claim made herein by the plaintiffs. Nothing more need be alleged to characterize these nine sections as part of the Tribe's aboriginal territory. But the paragraph as amended is much broader. It implies that title to all the lands, cities, and communities in the six parishes mentioned in the amendment is challenged. This implication is clearly refuted by other paragraphs and the prayer of the complaint and no such relief could be realized against the named defendants. The sole effect of the amendment is to furnish a gratuitous basis for disqualifying Judge Davis. Even the timing of the amendment suggests that this might be its purpose. That would be judge-shopping. Such an action would be devious, and complete bad faith on the part of the attorneys Guy J. Dantonio, John C. Holds and Harry K. Stansbury. We certainly imply no such purpose. The amendment is simply too broad and is unnecessary.

Therefore, plaintiffs' motion to amend Paragraph 8

of the original complaint as specified in Paragraph IV of their second supplemental and amending complaint is denied, reserving to plaintiffs the right to urge that the filing of Paragraphs I, II, III and V of the second supplemental and amending complaint be allowed. We do not pass here on that motion insofar as it pertains to those paragraphs. The allegations of Paragraph IV of the second supplemental and amending petition will not be included in our consideration of the motion to disqualify.

MOTION FOR DISQUALIFICATION OF JUDGE

This motion was brought under 28 U.S.C. § 144:

> "§144. BIAS OR PREJUDICE OF JUDGE. Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

and 28 U.S.C. § 455:

> "§455. INTEREST OF JUSTICE OR JUDGE. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a

material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

A. TIMELINESS

Nothing is alleged in any of the paragraphs of plaintiffs' motion and affidavit, except perhaps Paragraph III, which was not apparent prior to the filing of this suit. The matters alleged in Paragraph III have been known to plaintiff from the date prior to the filing of plaintiffs' first supplemental petition on June 19, 1979. Thus any motion relating to those allegations should have been filed at or prior to that date.

Since no request for Judge Davis' financial statement was made until August 29, 1979*, the allegations of Paragraph V of the motion can afford no excuse for failing to file the motion during the period in excess of two years prior to August 29, 1979. It should also be pointed out that the financial statement did not exist until May 15, 1979, almost two years after the filing of the suit and that none of the allegations of the motion and the affidavit are based on any disclosure in Judge Davis' statement. The motion was not timely filed. *U. S. v Patrick,* (1967, 6th Cir.), 542 F.2d 381, *cert. denied* 97 S.Ct. 1551, 430 U.S. 931, 51 L.Ed.2d 775; *Duplan Corp. v. Deering Milliken, Inc.,* (1975 D.C. S.C.), 400 F. Supp. 497; *Harley v. Oliver,* (1975, D.C. Ark.), 400 F. Supp 105.

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* We have been informed by the Clerk of Court that, on direction of Judge Davis, Judge Davis' financial statement was mailed to plaintiffs' attorneys on or about January 7, 1980.

Since the statute allows only one motion to disqualify we felt that plaintiff should be allowed to amend its original motion so as to add any causes which might be disclosed by Judge Davis' financial statement. We informed plaintiffs attorneys of record that we will allow a delay to Friday, January 18, 1980 for this purpose. No such amendment has been received although these attorneys have asked for additional time to file interrogatories upon Judge Davis, to take his deposition and other purposes. Under the authorities hereinafter set forth we deem this to be improper. The court must decide the matter strictly on the basis of the motion and the attached affidavit, conceding for this purpose the truth of the matters alleged in the affidavit and the good faith of the attorneys in filing the motion. For that reason we allowed no further extension.

B. MERITS

The following precepts govern our consideration of the motion. If there are no formal deficiencies in the motion and the affidavit, the court must assume the good faith of counsel and the party and the truth of the facts alleged "the test for disqualification pursuant to that statute is whether assuming the truth of the facts alleged a reasonable person would conclude that a personal as distinguished from a judicial bias exists. Neither the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge's personal knowledge to the contrary." *Smith v. Danyo* (1977 M.D. Pa.). *Also Mims v Shapp,* (1976, 3rd Cir.), 541 F.2d 415. Because of disruption and delay of the judicial process that can be caused by disqualification of a trial judge, affidavits of disqualification are strictly construed. *U. S. v. Womack* (1972, 5th Cir.), 454 F.2d 1337; *Smith v. Danyo, supra; Hawaii-Pacific Venture Capital Corp. v. Rothbard* (1977, D.C. Hawaii), 437 F. Supp 230; *Berger v. U.S.* (1921) 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481.

Such affidavits are strictly contrued so as to safeguard the judiciary from frivolous attacks upon its dignity. *Simonson v. General Motors Corp.* (1976, E.D. Pa.), 425 F. Supp 574. The acts alleged against the judge must demonstrate personal bias. The acts alleged must be extrajudicial. *U. S. v. Zagari* (1976, N.D. Ca.), 419 F. Supp 494.

The motion and the affidavit must state with particularity the identifying facts of time, place, persons, occasions and circumstances. *U. S. v. Townsend* (1973, 3rd Cir.), 478 F.2d 1072; *Morrison v. U. S.* (1969, N.D. Tex.), 321 F.Supp 286, *aff'd* 432 F. 2d 1227; *cert. denied* 915 S.Ct. 959, 401 U.S. 945, 28 L.Ed. 2d 227. The Fifth Circuit stated as follows in *Parrish v. Bd. of Commissioners* (1975, 5th Cir.),

> "The legal question presented is determined by applying the reasonable man standard to the facts and reasons stated in the affidavit. *See United States v. Thompson,* 3 Cir., 1973, 483 F.2d 527,

which states the standard as requiring that the facts be such, their truth being assumed, as would 'convince a reasonable man that a bias exists', 483 F.2d at 528. the tripartite test of the Third Circuit is as follows:

"In an affidavit of bias, the affiant has the burden of making a three-fold showing:

"1. The facts must be mateial and stated with particularity;

"2. The facts must be such that, if true they would convince a reasonable man that a bias exists.

"3. The facts must show the bias is personal, as opposed to judicial, in nature."

We must consider each of the grounds alleged in the affidavit in the light of these precepts.

1. "That, upon information and belief, the Honorable W. Eugene Davis resides and owns immovable property within the litigation area."

This is a mere conclusion. If the affiant knows where Judge Davis resides or where he owns immovable property, this should be stated with particularity. If the affiant knows that Judge Davis resides on or owns any part of the nine sections of land subject to this litigation, then he must so state and describe the land particularly. There is no need to state the facts on information and belief. the public records are available. The title to these lands is the very substance of this suit. If Judge Davis owns or claims to own any interest in the litigated area, he would have been made a defendent. There is no other reasonable conclusion. Obviously, the affidavit is insufficient.

2. "That, upon information and belief, one of his Honor's former clients is Texaco, Inc., which is a named defendent herein."

This allegation is clearly frivolous. Every Judge

has tried suits involving parties formerly represented by him or sued by him while in the practice of law. Judges usually sit in the area of their former practice. It is inevitable that he would be involved during his practice in suits for or against many individuals such as land owners, drivers and owners of automobiles, contractors, etc., and many businesses such as banks, finance companies, oil companies, transportation companies and particularly insurance companies. If Judge Davis' follows the pattern such individuals are involved in litigation before him repeatedly. This certainly is no basis for personal bias and significantly movers have failed to cite one authority to sustain their contingent. The simple fact that Texaco, Inc. may have been a former client is certainly not a basis for disqualification under either statute.

3. "That, Lawrence Simon, Jr., James L. Helm, Jr., John Henry Helm, Sarah Hastremski Helm, Sarah Frances Helm Evans, Adele S. Forest, Mildred M. Swatloski, and Mildred S. Linn, all named defendents are the children and/or widows of members of his Honor's former law firm, namely Lawrence Simon, Sr. and James L. Helm Sr. and further, property belonging to members of his Honor's former associates is claimed as aboriginal territory."

We are not disputing this allegation when we take judicial notice of the fact that Lawrence Simon, Sr. and James L. Helm, Sr. are former members of the law firm of which Judge Davis was a member. That Judge Davis was sworn into office on September 21, 1976. We also take judicial notice of the fact that Judge Davis practiced for some time in the firm of Phelps, Dunbar, Marks, Claverie & Sims for some period of time after his graduation from Tulane Law School in 1960. We take further notice of the fact that Lawrence Simon, Sr. died on or about 1963 and James Helms, Sr. died on or about 1967. Assuming, so as not to dispute the affidavit, that Judge Davis did join the firm prior to the death of Lawrence Simon, Sr., it has now been 16 or 17 years since that relationship ceased to exist and some 13

years in the case of James Helm, Sr. Judge Davis has stated that there is no bias and we see no reasonable grounds to doubt it. Here again, mover has alleged a factual basis but has failed to cite one single authority to sustain it. Our investigation has found no authority exactly on this point but has discovered and illuminating opinion by the Advisory Committ e on Judicial Activities published on Page I-17 of that Committee's volume "Code of Judicial Conduct for United States Judges." Canon 3 of the Code of Judicial Conduct provides "a judge should perform the duties of his office impartially and diligently".

> "Payments to a lawyer who leaves a firm to become a judge may continue to be made to the judge in accordance with any agreement provided it is clear (1) that he is not sharing in profits of the firm earned after his departure, as distinguished from his sharing in an amount representing the fair value of his interest in the firm, including the fair value of his interest in fees to be collected in the future for work done before he left the firm and [(2) such judge does not participate in any case in which his former firm or any partner or associate thereof is active as counsel until the full amount which he may be entitled to receive under the agreement has been paid to him.] **Advisory Opinions Nos. 24 and 56."**

It would seem reasonable therefore that if a member of the firm may practice actively before the judge as soon as the financial commitments between them have been liquidated, certainly it is reasonable to conclude that the children of former partners who have been dead 17 and 13 years respectively could appear as parties before the judge without any expectation of bias on account of the former partnership. We so hold.

4. "That, upon information and belief, his honor has rendered title opinions and passed acts of sale as an attorney and Notary Public for various parcels of property in the area claimed by the Chitimacha Tribe of

Louisiana as aboriginal territory and may bear professional liability as a consequence thereof and would, therefore, have a direct interest in the outcome of the present litigation."

This, like the first ground alleged, is a mere conclusion or generality. If Judge Davis has rendered any title opinions or passed any sales on the nine sections subject to this lawsuit the affiant should so state with particularity. For the same reasons set forth in our consideration of the first ground cited in the affidavit and motion we find the affidavit to be insufficient.

Having plaintiffs' motion, affidavit and authorities in hand, no hearing in this matter was necessary. It was clearly apparent without argument that the motion was not timely filed and that the affidavit was fatally and substantially insufficient to form a basis for the relief sought. We so hold.

Plaintiffs' motion to disqualify the judge should be dismissed.

Alexandria, Louisiana, this the 22nd day of January, 1980.

Nauman S. Scott
United States District Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRIC OF LOUISIANA LAFAYETTE DIVISION

CHITIMACHA TRIBE OF LOUISIANA

VS.

HARRY L. LAWS COMPANY, et al

CIVIL ACTION NO. 77-0772

SUPPLEMENTAL OPINION

Since in our opinion of April 23, 1980 we stated that "we do not know when plaintiff secured a copy of these Mineral Deeds (they are not certified) but we do know that plaintiffs secured a copy of the financial statement of the undersigned from the Clerk of Court three or four days following the issuance of our order of January 22, 1980, denying their motion". Plaintiffs' attorney, Mr. D'Antonio, has now informed the court that plaintiffs never secured a copy of the financial statement.

Our finding was based on our verbal instruction to the Clerk's Office to release the financial statement upon written request. That office had informed a caller from New Orleans that a written request was necessary. We have now learned that no such request was received, nor was the statement released. Although Mr. D'Antonio has informed us that it is not necessary, we feel that the record should be set straight. We apologize for the statement and the unfair implication which it suggests. For these reasons, it is

ORDERED that our opinion of April 23, 1980 be amended so as to strike therefrom the offending statement quoted above. The opinion in all other respects insconfirmed and ratified.

Alexandria, Louisiana, this the 26th day of April, 1980.

Nauman S. Scott
United States District Judge

APPENDIX "F"

THE CHITIMACHA TRIBE OF LOUISIANA et al, Plaintiffs-Appellants

v.

HARRY L. LAWS COMPANY, INC., et al., Defendants-Appellees.

United States Court of Appeals, Fifth Circuit

Nov. 5, 1982

Appeal from the United States District Court for the Western District of Louisiana.

Before CLARK, Chief Judge, and GEE and GARZA, Circuit Judges.

CLARK, Chief Judge:

The Chitimacha Tribe of Louisiana brought this suit in the Western District of Louisiana claiming ownership of a large tract of land in St. Mary Parish, Louisiana. They have named more than eighty St. Mary Parish landowners as defendants. The Chitimachas argue that three transfers of land in the eighteenth century from their ancestors to the defendants' predecessors in title were nullities, thus leaving them with full legal title. The district court, 490 F.Supp. 164, granted summary judgment in favor of the defendants. The Chitimachas argue that the trial judge erred in refusing to rescuse himself from presiding over this matter. They also argue that the court incorrectly decided their title claim. We affirm.

I. The Disqualification Issue

The Chitimachas argue that Judge W. Eugene

Davis erred when he refused to recuse himself. We conclude that the judge was not disqualified from deciding this case. Before reaching the substance of the claim, however, we outline this case's complicated procedural history.

This action was commenced in July, 1977 in the Western District of Louisiana. Judge W Eugene Davis was assigned to the case. Counsel for the Chitimachas informed Judge Davis in October, 1977, that his property might be affected by the suit and suggested that he recuse himself. The judge refused to honor this request.

In July of 1979, the Chitimachas filed the first of their amended complaints. The amendments added new defendants, made allegations of fraud, increased the amount of damages requested, and demanded a jury trial. The court immediately entered an order approving the amendments.

In August, 1979, the Chitimachas requested Judge Davis' financial disclosure statement. The request was refused. The Chitimachas moved the court to stay all proceedings pending disclosure of the financial report. The motion was denied. In November, the Chitimachas appealed the issue to this court, and moved this court and the district court to stay all proceedings pending that appeal. Both this court and the district court denied the motion.

In November, the Chitimachas requested the court for leave to amend their complaint a second time. The amendments sought, among other things, to add additional defendants to the case, and to clarify the precise boundaries of the Chitimachas' aboriginal territory. paragraph eight of the original complaint read:

> 8. Since time immemorial, the plaintiff tribe has exclusively owned, used and occupied portions of the present Parish of St. Mary, Louisiana, *as part* of its aboriginal territory.

(emphasis added). Paragraph IV of their motion to

amend sought to change the original complaint as follows:

> 8. Since time immemorial, the plaintiff Tribe has exclusively owned, used and occupied Iberia Parish, St. Mary Parish, St. Martin Parish, Iberville Parish west of the Mississippi River, Assumption Parish, and Ascension Parish west of the Mississippi as their aboriginal territory.

The motion was set for a hearing.

On November 13, the day before a hearing, which had been scheduled months in advance, the Chitimachas filed a motion to disqualify Judge Davis pursuant to 28 U.S.C. §§ 144 and 455. They alleged that Judge Davis was interested in the outcome of the litigation because: (1) the judge owned property within the Chitimachas' aboriginal territory; (2) one of the defendants was a former client of the judge; (3) the judge's former law partners had relatives who were defendants in the action; and (4) the judge previously rendered title opinions and passed acts of sale as an attorney and notary public for various parcels of property in the contested area. A supporting affidavit signed by Leroy M. Burgess, Chairman of the Chitimacha Tribal Council was also submitted. The Chitimachas' attorney certified that the affidavit was submitted in good faith.

Although Judge Davis commenced the scheduled hearing on November 14 as planned, the only motion he reached was the disqualification motion filed the previous day. Judge Davis initially indicated that, in his opinion, the motion was untimely:

> It's absolutely inexcusable for plaintiff's counsel to have delayed filing the motion to disqualify until the day before this hearing was scheduled. This delay has caused the Court and other counsel to waste substantial time in the preparation for hearing on these complex motions.

Nevertheless, "out of an abundance of caution," Judge

Davis transferred the disqualification motion to the chief judge of his district, Nauman S. Scott. Judge Davis pledge to recuse himself if Judge Scott concluded that an appearance of impropriety would result if he continued to preside over the case. Judge Davis suspended all further proceedings in the case pending resolution of the disqualification motion.

The clerk of court mailed a copy of Judge Davis' financial statement to the Chitimachas in January, 1980. Judge Scott informed the Chitimachas' attorneys that he would delay his decision on the recusal motion in order to give the Chitimachas an opportunity to amend their original motion in light of any new data revealed in the financial report. The Chitimachas never took advantage of this opportunity.

Before reaching the disqualification issue, Judge Scott passed on the Chitimachas' motion to amend their complaint. He felt compelled to rule on the motion because one of the alleged grounds for disqualifying Judge Davis was his ownership of property in Iberia Parish. One of the proposed amendments sought to add Iberia Parish to the suit as part of the Chitimachas' aboriginal territory. Iberial Parish was not mentioned in the original complaint. Judge Scott determined that the sole effect of the amendment was to furnish a gratuitous basis for disqualifying Judge Davis. He stated that the amendment did not add any substance to the Chitimachas' complaint. Judge Scott therefore refused to allow the amendment. He did not rule on the remainder of the motion to amend.

Judge Scott then proceeded to discuss the motion to disqualify Judge Davis. He ruled that the motion was not timely filed. He also analyzed each alleged ground for disqualification, and found that the affidavit was insufficient to form a basis for disqualification. He therefore concluded that there was no need for Judge Davis to recuse himself.

The Chitimachas moved Judge Scott to set aside his order and reassign the matter to yet another judge. They claimed that they had discovered grounds for dis-

qualifying Judge Scott. Judge Scott ruled that he was not disqualified, and reaffirmed his prior order with respect to Judge Davis.[1]

Before addressing the merits of the Chitimachas' claim that Judge Davis should have recused himself, we examine first, the propriety of the procedure employed below, and second, Judge Scott's partial denial of the Chitimachas' motion to amend their complaint.

[1, 2] Although Judge Davis' transfer of the disqualification motion to Judge Scott was somewhat irregular, it was not improper. The practice has been permitted in the past, *see, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 582-83 n. 13, 86 S.Ct. 1698, 1709-10 n. 13, 16 L.Ed.2d 778 (1966); *Tenants & Owners in Opposition to Redevelopment v. United States Dep't of Housing & Urban Dev.*, 338 F.Supp. 29, 31 (N.D. Cal. 1972), but it is not to be encouraged. The challenged judge is most familiar with the alleged bias or conflict of interest. He is in the best position to protect the nonmoving parties from dilatory tactics. See *United States v. Haldeman*, 559 F.2d 31, 131 (D.C.Cir. 1976), *cert, denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977) (submitting § 144 motions to fellow judges for decision is "at most permissive.") Referring the motion to another judge raises problems of administrative inconvenience and delay. *Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98, 107 (5th Cir.) (Gee, J., specially concurring), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1975). Although the matter is ultimately within the discretion of the challenged judge, recusal motions should only be transferred in unusual circumstances. Although such circumstances are not present in this case, it does not present error affecting substantial rights of the parties, Fed.R.Civ.P. 61, and does not involve a disregard of established procedural precedent. Thus, no reversible error is presented.

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[1] The Chitimachas have not appealed from Judge Scott's ruling on his own disqualification.

[3] Judge Davis also transferred the Chitimachas' motion to amend their complaint to Judge Scott. Both Judge Davis and Judge Scott apparently concluded that Judge Scott could not accurately determine whether Judge Davis should be recused without the benefit of a final decision on the motion to amend the complaint. Judge Davis owned property in Iberia Parish. The original complaint did not mention Iberia Parish. The proposed amendment did. Without the benefit of hindsight, it reasonably may have appeared that the decision on the recusal motion would directly turn on the result of the motion to amend. In addition, the judges apparently felt that it would be inappropriate for Judge Davis to decide the matter pending the decision on his disqualification. While such transfers are not to be encouraged, no reversible error is present under the circumstances of this particular case. *Cf. United States v. Martinez*, 686 F.2d 334 (5th Cir., 1982); *United States v. Stone*, 411 F.2d 597, 598 (5th Cir. 1969) (District judges may transfer cases between themselves for the expeditious administration of justice.)

Judge Scott denied leave to amend with respect to one of the Chitimachas' proposed amendments. He therefore refused to include the substance of that amendment in his consideration of the motion to disqualify. The Chitimachas argue that the district court erred in partially denying the motion. They argue that the complaint should be regarded as having been so amended for purposes of any consideration of Judge Davis' disqualification. We hold that the court properly disallowed the amendment.

[4, 5] Rule 15(a) of the Federal Rules of Civil Procedure provides that, within specified time limits, a party may amend his pleading once as a matter of course. Otherwise, "a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Determining when "justice so requires" rests within the sound discretion of the trial

court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77 (1971); *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1024 (5th Cir. 1981). Our function on review is limited to determining whether the trial court abused its discretion. *Jackson v. Columbus Dodge, Inc.*, 676 F.2d 120, 121 (5th CIr. 1982); *Daly v. Sprague*, 675 F.2d 716, 723 (5th Cir. 1982).

[6] Rule 15(a) evinces a bias in favor of granting leave to amend. Its purpose is to assist the disposition of the case on its merits, and to prevent pleadings from becoming ends in themselves. *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981); *Summit Office Park v. United States Steel Corp.*, 639 F.2d 1278, 1284 (5th Cir. 1981); *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981). Although the district court should err on the side of allowing amendment, leave to amend should not be given automatically. *Addington v. Farmer's Elevator Mutual Insurance Co.*, 650 F.2d 663, 666 (5th Cir. 1981), *cert. denied*, —— *U.S.* ——, *102 S.Ct. 672, 70 L.Ed.2d 640 (1982).*

[7] In exercising its discretion, the trial court should consider whether permitting the amendment would cause undue delay in the proceedings or undue prejudice to the nonmoving party, the movant is acting in bad faith or with a dilatory motive, or the movant has previously failed to cure deficiencies in his pleadings by prior amendments. The court may weigh in the movant's favor any prejudice that might arise from denial of leave to amend. In keeping with the purposes of the rule, the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation. Finally, the court should consider whether the amendment adds substance to the original allegations, and whether it si germane to the original case of action. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Daly v. sprague*, 675 F.2d 716, 723 (5th Cir.

1982); *Pan-Islamic Corp. v. Exxon Corp.*,632 F.2d 539, 546 (5th Cir. 1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1982); *Henderson v. United States Fid. & Guar. Co.*, 620 F.2d 530, 534 (5th Cir. 1980), *cert. denied*, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495 (1981).

[8, 9] One important factor in the district court's decision is the timeliness of the motion to amend. Mere passage of time need not result in a denial of leave to amend, but delay becomes fatal at some period of time. *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th cir. 1981). When there has been an apparent lack of diligence, the burden shifts to the movant to prove that the delay was due to excusable neglect. *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1025 (5th Cir. 1981) (liberality in pleading does not bestow on a litigant the privilege of neglecting her case for a long period of time.); *Dussouy v. Gulf Coast Investment Corp.*, 660 f.2d 594, 598 n. 2 (5th Cir. 1981).

In *Jackson v. Columbus Dodge, Inc.*, 676 F.2d 120 (5th Cir. 1982), we held that the trial court did not abuse its discretion when it refused to approve an amendment filed the day before the pretrial conference, twenty-eight months after the litigated transaction, and nineteen months after the original complaint was filed. In *Daly v. Sprague*, 675 F.2d 716 (5th Cir. 1982), the fact that the proposed amendment was not filed until sixteen months after the original complaint was filed was weighed against the movant. In *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022 (5th Cir. 1981), we noted the unexplained nineteen-month delay between the filing of the original complaint and the motion for leave to amend and concluded that the trial court did not abuse its discretion by refusing leave to amend. *See also, Rhodes v. Amarillo Hospital Dist.*, 654 F.2d 1148 (5th Cir. 1981) (amendment filed thirty months after the initial complaint and three weeks before trial denied).

[10] The Chitimachas requested leave to amend two years and three months after they filed their original complaint. Because this litigation is complex and involves many parties, the fact that there was a lengthy delay is not dispositive. The factor does, however, weigh against the Chitimachas.

It was also proper to consider whether the Chitimachas would be prejudiced if denied leave to amend. Judge Scott correctly found that they would not. The amendment in question merely sought to clarify the precise boundaries of the Chitimachas' aboriginal domain. Paragraph V of the proposed amendments itself demonstrates that the Chitimachas continued to seek only to establish their title to land in St. Mary Parish:

> This is a civil action to restore the Chitimacha Tribe of Louisiana to possession of certain aboriginal territory in St. Mary Parish, Louisiana . . . .

The Chitimachas' claim to the land in St. Mary Parish depended on a finding that it was somewhere within the boundaries of their aboriginal territory. Once that finding was made the extent of the aboriginal territory was irrelevant. The proposed amendment does not add substance to the Chitimachas' cause of action. The denial of leave to amend in no way compromised the Chitimachas' chance of recovery. *See Rhodes v. Amarillo Hospital Dist., supra,* 654 F.2d at 1154 ("This is not a case in which incomplete or inadequate pleadings, uncorrected by amendment, doomed plaintiff's recovery.")[2]

The Chitimachas failed to correct pleading deficiencies when given the opportunity to do so. *Dussouy, supra,* 660 F.2d at 598. Although The Chitimachas previously amended their complaint, they offer no justification for their failure to clearly delineate the boundaries of their aboriginal territory in those amendments.

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[2] This case may be analogized to a suit between two parties concerning the ownership of a certain cow. Whether this cow is part of a herd of ten cows or part of a herd of a hundred cows is irrelevant.

The information was available to the Chitimachas long before the first amendments were filed. It is not information that has only recently come to light.

Although not relied upon by the district court, this court noted that it is improper to amend solely to gain a tactical advantage. *Dussouy v. Gulf Coast Ins. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981). Judge Scott observed:

> The sole effect of the amendment is to furnish a gratuitous basis for disqualifying Judge Davis. Even the timing of the amendment suggests that this might be its purpose. That would be judge shopping. Such an action would be devious, and complete bad faith on the part of the [Chitimachas'] attorneys . . . . We certainly imply no such purpose.

In the absence of any district court finding with respect to this factor we do not include it in our analysis.

Perhaps no one of these factors standing alone would justify a denial of leave to amend. But their combined effect demonstrates that Judge Scott did not abuse his discretion when he partially denied the Chitimachas' motion to amend.

[11, 12] The issue for determination is whether Judge Scott erred in holding that Judge Davis was not disqualified.[3] The relevant statutes are 28 U.S.C. §§

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[3] Disqualification questions are fully reviewable on appeal from a final judgment. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 960-61 (5th Cir. 1980).

The Chitimachas filed their motion to disqualify over two years after the original complaint was filed. It was submitted on the day before a motion hearing that has been scheduled months in advance. Both 28 U.S.C. §§ 144 and 455 require that a motion to disqualify be timely filed. *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982) ("Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation strategy."); *Weber v. Coney*, 642 F.2d 91, 92 (5th Cir. 1981). Because, as Judge Davis put it, "nothing is more important to our system of justice than to have impartial judges presiding over trials," courts are justifiably reluctant to simply disregard an untimely claim. *United States v. Womack*, 454 F.2d 1337, 1341 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316 (1973).

Although both Judge Davis and Judge Scott concluded that the motion to disqualify was untimely, Judge Davis went on to transfer the substance of the claim and Judge Scott went on to decide it. As did the district court, we reach the merits of the disqualification claim and conclude that Judge Davis was not disqualified from presiding over this case. We therefore also find it unnecessary to decide whether the motion to disqualify was timely filed.

144 and 455.[4] Both statutes are based on the notion that a fair trial before an unbiased judge is a basic requirement of due process. *United States v. Will,* 449 U.S. 206, 101 S.Ct. 471, 481, 66 L.Ed.2d 392 (1980). "Substantively, the two statutes are quite similar, if not identical." *Delesdernier v. Porterie,* 666 F.2d 116, 120 (5th Cir. 1982) (*app. png.*) quoting Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1019 (5th Cir. 1981), *cert. denied,* —— U.S. ——, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982). There are, however, some differences between the two.

[13, 14] When faced with a motion under § 144, the court focuses on the movant's affidavit. The judge must pass on the legal sufficiency of the affidavit, but not on the truth of the matters alleged. *Berger v. United States,* 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921); *United States v. Clark,* 605 F.2d 939, 942 (5th Cir. 1979). An affidavit is sufficient if it alleges facts that, if true, would convince a reasonable person that bias exists. *Phillips, supra,* 637 F.2d at 1019; *United States v.*

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[4] 28 U.S.C. § 144 reads in part:

Whenever a party to anyproceeding in a district court makes and files a timely and sufficient affidavit that thejudge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 455 reads in part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or turstee of a party;

(ii) Is acting as a lawyer in the proceeding'

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Serrano, 607 F.2d 1145, 1150 (5th Cir. 1979), *cert. denied,* 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *Parrish v. Board of Commissioners,* 524 F.2d 98, 100 (5th Cir. 1975) (en banc) *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

[15, 16] A party may also file a motion to disqualify under 28 U.S.C. § 455. *Davis v. Board of School Commissioners,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The movant must show that, if a reasonable man knew of all the circumstances, he would harbor doubts about the judge's impartiality. *Parliament Insurance Co. v. Manson,* 676 F.2d 1069, 1075 (5th Cir. 1982); *Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1111 (5th Cir.), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). The goal of § 455 is to foster impartiality by requiring even its appearance. *United States v. Phillips,* 664 F.2d 971, 1022 (5th cir. 1981); *Potashnick, supra,* 609 F.2d at 1111.

[17] A recusal motion under both statutes is committed to the sound discretion of the district judge. On appeal we ask only whether he has abused that discretion. *Weingart v. Allen & O'Hara, Inc.,* 654 F.2d 1096, 1107 (5th Cir. 1981); *United States ex rel Weinberger v. Equifax, Inc.,* 557 F.2d 456, 463 (5th Cir.), *cert. denied,* 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1977). In this case, Judge Scott did not abuse his discretion in dismissing the motion to disqualify.

[18] The Chitimachas allege that Judge Davis should have been disqualified because he "resides and owns immovable property within the litigation area." Judge Davis is not a named defendant because he owns no property in St. Mary Parish. He does, however, own property in Iberia Parish. By attempting to amend their complaint, the Chitimachas sought to show that Iberia Parish is within their aboriginal territory. The Chitimachas reason that all land within this territory will be "directly affected" by the outcome of the lawsuit.

The problem is that they fail to show it. The St. Mary lands are the centerpiece of this litigation. They remained so under the proposed amendment. That both St. Mary and Iberia Parish lands were within the aboriginal claim may be conceded. the controlling issue still remains whether the specific ancestral grants of the St. Mary Parish lands were effective or void. We have upheld the decision of Judge Scott rejecting the amendment which attempted to add Iberia Parish to the aboriginal territory. Even if leave to amend were granted, the mere fact that Judge Davis owns some property within the expanse of the Chitimachas' former dominion does not justify his disqualification. The disposition of the Chitimachas' claim or title to land located entirely within St. Mary Parish would not affect Judge Davis' title in any way. This ownership is not a ground for disqualification.

[19] The Chitimachas allege that Judge Davis formerly represented Texaco, Inc., a defendant in this action. Judge Davis was appointed to the bench six years ago. The fact that he once represented Texaco in unrelated matters does not forever prevent him from sitting in a case in which Texaco is a party. Section 455(b)(2) only requires a judge to disqualify himself if "he served as a lawyer *in the matter in controversy.*" (emphasis added). The relationship between Judge Davis and Texaco, terminated at least six years ago, is too remote and too innocuous to warrant disqualification under § 455(a) or § 144.

[20] The Chitimachas also allege that Judge Davis has an ongoing investment interest in his former law firm. This allegation was not included in their affidavit. Therefore, § 455 is the only applicable section. The Chitimachas' scenario is as follows: Texaco is a defendant in this suit. Although the judge's former lawfirm occasionally represents Texaco in other matters, it does not represent Texaco or any other party in this case. Judge Davis has received periodic payments

from his former law firm but there is no proof or suggestion that he is sharing in profits of the firm earned after his departure.[5] The Chitimachas assert that if Texaco suffers in this suit, the judge's former law firm might suffer indirectly. Texaco might suffer such an overwhelming financial loss that it will no longer be able to employ the judge's former firm. As a result, the firm will have less income and could be forced to cut back on the periodic payments it makes to the judge. At best, this speculation is remote and unrealistic. It does not justify disqualification.

[21] The Chitimachas assert that Judge Davis should be disqualified because some defendants are related to members of his former law firm. The parties involved are not related to Judge Davis. They are not Judge Davis' former associates. They are relatives of Judge Davis' former associates. Again we find the connection to be too remote to justify recusal.

[22, 23] Finally, the Chitimachas assert that Judge Davis "has rendered title opinions and passed acts of sale as an attorney and notary public for various parcels of property in the area claimed by the Chitimachas Tribe of Louisiana as aboriginal territory and may bear professional liability as a consequence thereof . . . ." In order to be sufficient, an affidavit submitted pursuant to 28 U.S.C. § 144 must contain facts which are stated with particularity. *Phillips v. Joint Ligislative Committee, supra,* 637

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[5] The commentary to Canon 3 of the code of Judicial Conduct provides:

When a partner leaves a law firm to become a federal judge, he should, if possible, agree with his partners on an exact amount, which he will receive for his interest in the firm, whether the sum is to be paid within the year or over a period of years. *Advisory Opinions Nos. 24 and 56.*

Payments to a lawyer who leaves a firm to become a judge may continue to be made to the judge in accordance with any agreement provided it is clear (1) that he is not sharing in profits of the firm earned after his departure, as distinguished from his sharing in an amount representing the fair value of his interest in the firm, including the fair value of his interest in fees to be collected in the future for work done before he left the firm and (2) such judge does not participate in andy case in which his former firm or any partner or associate thereof is active as counsel until the full amount which he may be entitled to receive under the agreement has been paid to him. *Advisory Opinions Nos. 24 and 56.*

F.2d at 1019; *Parrish v. Board of Commissioners, supra,* 524 F.2d at 100. The Chitimachas have failed to specify what acts they are referring to. They do not specify whether the land involved is within the St. Mary Parish land area involved in this litigation. Their allegations were not stated with sufficient particularity. A court cannot adjudicate on vague, unsupported allegations of this sort.

Viewed either separately or in light of their combined effect, the Chitimachas' allegations do not withstand close analysis. The allegations contained in their § 144 affidavit, taken as true, would not convince a reasonable person that bias exists. Recusal is no justified under 28 U.S.C. § 455 because a reasonable man, had he known of all the circumstances asserted would not harbor doubts about Judge Davis' impartiality. Judge Scott correctly dismissed the Chitimachas' motion to disqualify Judge Davis.

II. *The Merits of the Title Claim*

The Chitimachas argue that the district court erred in granting summary judgment for the defendants. They contend that the Indian Nonintercourse Act, 25 U.S.C. § 177, requires that their tribal lands be returned to them. They argue that, as Indians, they were not bound by the requirements of the Louisiana Land Claims Acts. Even if the Acts did apply, they argue that the Acts did not obligate them to file claims with the Commission established by the Act. Therefore, they argue that their title was never forfeited.

[24] The Indian Nonintercourse Act did not apply to the sales involved in this cause of action. Because their title was incomplete, the Chitimachas were obligated to file their claims under the terms of the Louisiana Land Claims Acts. Their failure to do so resulted in a forfeiture of their claims. For these reasons, we uphold the district court's grant of summary judgment in favor of the defendants.

The Chitimachas were a large aboriginal group

which populated a central portion of what is now the State of Louisiana. During a period of Spanish sovereignty over the region, the Chitimachas transferred the land involved in this litigation to the defendants' ancestors in title. the Chitimachas deeded one tract to Phillip Verret on September 10, 1794, another tract to Frederick Pellerin on October 1, 1794, and a third tract to Marie Joseph on June 22, 1799.

Spanish law required a colonist to obtain the express approval of the Spanish governor before purchasing any land from the Indians. *Chouteau v. Molony*, 57 U.S. (16 How.) 203, 229, 14 L.Ed. 905 (1853); *Mitchell v. United States*, 34 U.S. (9 Pet.) 711, 740, 9 L.Ed. 283 (1835). The Chitimachas do not contest the fact that the transfers were made. They argued instead that the deeds were ineffective to transfer title because they were not approved by the Spanish governor. Although defendants argue to the contrary, we will assume that the deeds were not properly approved.

In 1800, Spain relinquished the Louisiana territory to France. In 1803, the United States acquired the territory by the Louisiana Purchase. The United States found that the state of record title in its new territory was in disarray. In order to alleviate the problem, Congress passed a series of statutes collectively known as the Louisiana Land Claims Acts.[6]

The first in the series of Acts was passed in 1805. It required every individual with incomplete title to file a claim before a newly established Board of Land Commissioners. Persons with perfect or complete title were not required to file a claim, but were given the option to do so. The Board was to analyze each claim filed and report its findings to Congress. If any individual with incomplete title failed to file his claim, his right to claim title would "forever thereafter be barred."

The second Act, passed in 1807, gave the Board the

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[6] Act of March 2, 1805, 2 Stat. 324; Act of April 21, 1806, 2 Stat. 391; Act of March 3, 1807, 2 Stat. 440; Act of March 10, 1812, 2 Stat. 692; Act of April 14, 1812, 2 Stat. 709; Act of February 27, 1813, 2 Stat. 807; Act of April 18, 1814, 3 Stat. 139; Act of April 29, 1816, 3 Stat. 328; Act of may 11, 1820, 3 Stat. 573; Act of May 16, 1826, 4 Stat. 168; Act of May 26, 1824, 4 Stat. 52 (extended to Louisiana by Act of June 17, 1844, 5 Stat. 676).

power to decide all claims presented to it. The Act also extended the time for filing evidence of incomplete titles. It contained preemptive language similar to that contained in the 1805 Act:

> [B]ut the rights of such persons as shall neglect so doing [filing notice of claim] within the time limited by this act, shall, so far as they are derived from or founded on any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law or equity whatever.

The subsequent Acts repeated extended the time for filing. Each Act provided that untimely claims would be void and not admitted as evidence in the courts of the United States.

The Chitimachas never filed a claim asserting rights in the land they transferred to Verret, Pellerin and Joseph. All three transferees filed their claims with the Board. All three claims were eventually confirmed. Title was not disputed until the commencement of this suit.

The Chitimachas first argue that these transfers violated the terms of the Indian Nonintercourse Act, 25 U.S.C. § 177. At the time of these transfers, that Act provided:

> That no sale of land made by any Indians or any nation or tribe of Indians within the United States, shall be valid ... unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, 1Stat. 137.

[25] The Indian Nonintercourse Act did not apply to the 1794 and 1799 transfers of land from the Chitimachas to Verret, Pellerin and Joseph. These sales were not consummated "within the United States."

Neither the transferor Indians nor the transferee settlers were located "within the United States." At the time these sales were made, the Louisiana territory was under Spanish dominion. As a result, Spanish, and not United States, law applied. The legislation of Congress does not extend beyond the boundaries of the United States unless a contrary legislative intent appears. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285, 73 S.Ct. 252, 255, 97 L.Ed. 252 (1952); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977); Restatement (Second) *Foreign Relations Law* § 38 (1965). It is quite the opposite intent that appears in this case. The 1807 act directed the Board to decide claims brought before it "according to the laws and established usages and customs of the French and Spanish governments." The "Opelousas Report," a statement of policy prepared by the Board, specifically concluded that the Indian Nonintercourse Act did not apply to sales made prior to the Louisiana Purchase. Congress confirmed and adopted the Opelousas Report by the Act of April 29, 1816, 3 Stat. 328.

[26] The Chitimachas' next argument is that the Louisiana Land Claims Acts did not apply to them. The district court concluded that the Chitimachas were bound by the provisions of the Acts. We agree.

In *Barker v. Harvey*, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963 (1901) and in *United States v. Title Insurance & Trust Company*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924), the Supreme Court interpreted the California Private Land Claims Act, Act of March 3, 1851, 9 Stat. 631. That Act was very similar to the Louisiana Land Claims Act. It created a commission to ascertain and settle title claims within the territory ceded to the United States by Mexico. All claims which were not brought before the commission within two years were forfeited. The plaintiffs in *Barker* claimed land under Mexican grants. Their claim had been properly filed and was confirmed by the Commission. Although the defendants, the Mission Indians, never presented their

claim to the Commission, they asserted the right to permanently occupy the land. The plaintiffs filed suit to quiet their title against the Mission Indians' claim. The Court held that the defendant Indians were bound by the provisions of the Act. *Barker v. Harvey, supra.* 181 U.S. at 491, 21 S.Ct. at 694. "If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration. . . ."

In *United States v. Title Insurance & Trust Co., supra,* the United States brought suit on behalf of certain Mission Indians "to quiet in them a 'perpetual right' to occupy, use, and enjoy" a tract of land in southern California. The Indians had never filed a claim before the commission. On the other hand, the defendant's grant was confirmed pursuant to the provisions of the Act. The Court held that the Indians forfeited their claim by failing to present it to the commission.

The Chitimachas argue that the Louisiana Acts more closely resemble the statutes interpreted in *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 62 s.Ct. 248, 86 L.Ed. 260 (1941) than those involved in *Barker.* The *Santa Fe* statutes established the office of Surveyor General of New Mexico. They authorized the Surveyor General "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico," and required him to report his findings to Congress. Act of July 22, 1854, 10 Stat. 308; Act of July 15, 1870, 16 Stat. 291, 304. The Court expressly stated that the statutes were very different from those involved in *Barker* and *Title Insurance & Trust Co.* The statutes did not set up any system for filing and deciding the validity of the land claims. They did not contain a forfeiture provision.

As the district court put it, "the similarities of the Louisiana and California Acts are unmistakable, their differences with the Arizona and New Mexico Acts palpable." 490 F.Supp. 164, 170. *Barker* and *Title Insurance & Trust Co.* amply support the district court's

conclusion that the Chitimachas were bound by the filing requirements of the Louisiana Land Claims Act.

The Louisana Land Claims Act only required persons with "incomplete title" to file their claims. *Botiller v Dominquez,* 130 U.S. 238, 252-54, 9 S.Ct. 525, 529-30, 32 L.Ed. 926 (1889); *Maguire v. Tyler,* 75 U.S. (8 Wall.) 650, 652, 19 L.Ed. 320 (1869); *Fremont v. United States,* 58 U.S. (17 How.) 542, 553, 15 L.Ed. 241 (1854); *United States v. Power's Heirs,* 52 U.S. (11 How.) 570, 582, 13 L.Ed. 817 (1850). Thus, this case turns on the meaning of "incomplete title." If the Chitimachas had "complete title," they were outside the scope of the Acts and were not obligated to file. If they had "incomplete title," they were required to file and their failure to do so resulted in a forfeiture.

The term "incomplete title" has been used interchangably with "imperfect title," "equitable title" and "inchoate title." *Ainsa v. New Mexico & A. R. Co.,* 175 U.S. 76, 84, 20 S.Ct. 28, 31, 44 L.Ed. 78 (1899); *Maguire v. Tyler,* 75 U.S. (8 Wall.) 650, 661, 19 L.Ed. 320 (1869); *Smyth v. New Orleans Canal & Banking Co.,* 93 F. 899, 920-21 (5th Cir. 1899). Incomplete title is that title which was not valid until confirmed by the United States government. *United States v. Roselius,* 56 U.S. (15 How.) 36, 38, 14 L.Ed. 590 (1853); *Smyth, supra,* 93 F. at 920; *Lavergne's Heirs v. Elkins Heirs,* 17 La. 220, 231 (1841). It is title that was not already full, legal and absolute when the territory was ceded to the United States. *Dent v. Emmerger,* 81 U.S. (14 Wall.) 308, 312, 20 L.Ed. 838 (1871); *United States v. Wiggins,* 39 U.S. (14Pet.) 334, 349, 10 L.Ed. 481 (1880); *United States v. Percheman,* 32 U.S. (7 Pet.) 51, 86, 8 L.Ed. 604 (1833); *United States v. Arredondo,* 31 U.S. (6 Pet.) 691, 8 L.Ed. 547 (1832).

For example, incomplete title exists when the claimant produces documentary evidence of title which contains no sufficient boundaries to show that any definite and distinct parcel of land was severed from the public domain. *United States v. King,* 44 U.S. (3 How.) 773, 786, 11 L.Ed. 824 (1845); *United States v. Forbes,*

40 U.S. (15 Pet.) 173, 10 L.Ed. 701 (1841). It exists when a grantee has a proper deed, but the grantor did not have the power to transfer title. *Maguire, supra,* 75 U.S. (8 Wall.) at 657. It may exist when two grants are made of the same land. *Landes v. Brant,* 51 U.S. (10 How.) 348, 370, 13 L.Ed. 449 (1850). It exists when the only evidence of a purported grant of the Spanish governor is a notation in a notary's book. *United States v. Power's Heirs,* 52 U.S. (11 How.) 570, 571, 13 L.Ed. 817 (1850). *See also, United States v. Pellerin,* 54 U.S. (13 How.) 9, 10, 14 L.Ed. 28 (1851) (French grants made after territory ceded to Spain not confirmed by Spanish authorities).[7]

If the Chitimachas had any title at all in the Verret, Pellerin and Joseph tracts, it was incomplete, imperfect title. They executed and delivered deeds for valid consideration to the defendant's ancestors in title. They released possession of the land and allowed the settlers to hold the property. The failure to conform to the technicalities of Spanish law in executing the transfers left th Chitimachas with incomplete title. Therefore, if they wished their land returned, they were obligated to file their claim before the Board of Land Commissioners. They did not do so. As a result, they forfeited their claims.

We hold that the Indian Nonintercourse Act did not apply to the sales involved in this case. The Chitimachas were bound by the provisions of the Louisiana Land Claims Acts. Those Acts required persons with incomplete title to file, or forfeit their claim. If the Chitimachas had any title, they had only incomplete title to the land in question. They failed to file pursuant to the provisions of the Acts. As a result, they forfeited their claims to the Verret, Pellerin and Joseph tracts. The judgment of the district court is

AFFIRMED.

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[7] *See generally, Trenier v. Stewart,* 101 U.S. 797, 802, 25 L.Ed. 1021 (1879); *Dent v. emmeger,* 81 U.S. (14 Wall.) 308, 312, 20 L.Ed. 838 (1871); *United States v. McCullagh,* 54 U.S. (13 How.) 216, 217, 14 L.Ed. 118 (1851); *United States v. Wiggins,* 39 U.S. (14 Pet.) 334, 10 L.Ed. 481 (1840); *United States v. Arredondo,* 31 U.S. (6 Pet.) 691, 8 L.Ed. 547 (1832).

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 30-3348

THE CHITIMACHA TRIBE OF LOUISIANA, ET AL.,
Plaintiffs-Appellants

Versus

HARRY L. LAWS COMPANY, INC., ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 11/5/82, 5 Cir., 1982, F.2d).
(January 14, 1983)
Before CLARK, Chief Judge, GEE and GARZA, Circuit Judges.

PER CURIAM:
(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Charles Clark,
United States Circuit Judge